PETITION FOR WRIT OF CERTIORARI

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In The
Supreme Court of the United States

LEROY McKNIGHT, *et al.*,

Petitioners,

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Do the anti-discrimination protections of the Americans With Disabilities Act and its implementing regulations apply to disabled former employees?

(2) Under the Americans With Disabilities Act and its implementing regulations, may an employer, which does not reduce the retirement benefits of non-disabled workers who have post-retirement earnings, reduce the retirement benefits of disabled workers solely because they receive federal disability benefits?

PARTIES

The petitioners are Leroy McKnight, Nicholas Klayo, and Robert Griffin. The respondent is the General Motors Corporation.

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Petitioners Leroy McKnight, *et al.*, respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on December 4, 2008.

OPINIONS BELOW

The December 4, 2008 opinion of the court of appeals, which is reported at 550 F.3d 519 (6th Cir. 2008), is set out at pp. 1a-24a of the Appendix. The March 20, 2007 decision of the district court, which is unofficially reported at 2007 WL 851633 (E.D.Mich. 2007), is set out at pp. 25a-45a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on December 4, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix.

STATEMENT OF THE CASE

In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), this Court held that Title VII applies to former employees. In the wake of *Robinson*, the courts of appeals have repeatedly disagreed as to whether the anti-discrimination provisions of the Americans With Disabilities Act (ADA) apply to disabled former employees. In the instant case the Sixth Circuit held that the ADA does not protect such former employees, expressly rejecting the contrary holdings in the Second and Third Circuits. (15a-20a).

This case concerns the early retirement benefits available to General Motors employees. After thirty years of employment, General Motors hourly and salaried workers[1] may retire even though they have not yet reached the normal retirement age. An employee who opts for early retirement initially receives two benefits, monthly retirement payments (which continue as long as the worker lives) and an early retirement supplement. The early retirement supplement lasts until the worker reaches the age of 62 and one month, at which point he or she is eligible for Social Security Old Age benefits.

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[1] The terms of the early retirement benefit programs for hourly and salaried employees are largely similar. (3a-5a).

Petitioner McKnight was an hourly worker prior to his retirement. Petitioners Klayo and Griffin were salaried employees.

Under both the monthly retirement and the early retirement supplement a retiree is free, without any reduction in benefits, to return to the workforce and work full time or part time. Retirees may, without any effect on their benefits, resume work for General Motors as contract employees, and a significant number of retirees do just that.

This case concerns the circumstance in which the pension plan[2] reduces a worker's benefits. If a retiree receives, or "could become eligible for," Social Security Disability Insurance benefits (SSDI), the retiree's monthly early retirement supplement is substantially reduced.[3] Social Security Disability Insurance provides

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[2] Under some circumstances certain types of Workers' Compensation payments received by a retiree may result in a reduction, of equal size, of retirement benefits. Motion for Summary Judgment Submitted by Defendant General Motors, Exhibit A, Supplemental Agreement Covering Pension Plan, Article IV, sec. 2. No deductions are permitted, for example, for "fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member."

In the proceedings below, respondent offered no assertions or evidence as to whether such reductions have actually occurred, or how frequently, with regard to workers who had taken early retirement. Counsel for the employer acknowledged that (like SSDI) Workers' Compensation benefits "will probably be paid to somebody who is contending they are disabled." (Transcript of Motion for Summary Judgment, p. 13).

Neither court below referred to or relied on this provision.

[3] The early retirement supplement is reduced by the amount of the "temporary benefit" to which the retiree would have been entitled had he or she qualified for the Temporary Benefit. The Temporary Benefit is a separate benefit paid by

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benefits to individuals who are no longer able to work and who previously made Social Security contributions for the requisite number of quarters. See *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999). Under the General Motors retirement plans, if the Social Security Administration (because of the delay between application for and approval of monthly SSDI benefits) provides a retiree with a retroactive award of SSDI benefits, General Motors insists on repayment of a substantial sum for early retirement supplemental payments made by the company during the period for which SSDI benefits were later retroactively awarded.[4] Non-disabled workers are not subject to having their retirement

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General Motors to certain individuals who, because of disability, are permanently and totally prevented from regular employment at the General Motors plant where they have seniority. The eligibility standards and benefit levels of the Temporary Benefit are somewhat different than the standards for SSDI. The Temporary Benefit is not available to a disabled worker who is able to obtain SSDI or who is over 62 and one month and thus able to obtain Social Security Old Age benefits.

The court of appeals at one point suggested that the reduction is equal to the amount of the SSDI payment. (5a n.1). That is not correct. Elsewhere the court of appeals described the reduction as "apparently about equal to the...SSDIB." (5a). For all three of the plaintiffs the reduction in their early retirement supplement was smaller than the amount of the SSDI which they received.

[4] The reduction is equal to the total Temporary Benefit payments that would have been made to the worker, had he been eligible for them, during the period for which the retroactive SSDI benefits were paid. See n.3, *supra*.

benefits reduced or reclaimed in this manner because of post-retirement earnings.

Petitioner McKnight retired in February 2000; in November 2000, McKnight began receiving SSDI benefits. Because of the SSDI benefits, General Motors reduced McKnight's monthly retirement benefits by $1,165.50 per month,[5] from $2,730.00 to $1,564.50. (26a). The employer also claimed entitlement to repayment of $10,489.50 for retirement benefits previously paid to McKnight. (6a). In 2000 General Motors notified McKnight that it would suspend payment of even the reduced retirement benefits to McKnight "until the full amount of any overpayment has been recovered."[6]

Petitioner Griffin retired from General Motors in December 1998, and was awarded SSDI benefits in 2002. Because of the SSDI benefits, General Motors reduced Griffin's monthly retirement benefits by $951.45, to $1,182.04 per month. The employer claimed entitlement to repayment of $30,446.40 for retirement benefits previously paid to Griffin, to cover the period for which Griffin received retroactive SSDI benefits from the Social Security Administration. (6a, 32a). General Motors notified Griffin it

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[5] The reduction was less than the $1592.20 SSDI benefit which McKnight received. (26a).

[6] Memorandum of Law In Support of The Motion for Summary Judgment Submitted by Defendant General Motors, Exhibit H, Letter to Leroy McKnight, November 22, 2000.

would suspend payment of any retirement benefit until that $30,446.40 had been recovered.[7]

Petitioner Klayo retired in January, 1999, and was awarded SSDI in 2003. Because of the SSDI benefits, General Motors reduced Klayo's retirement benefits by $976.86 per month, and claimed entitlement to repayment of $35,166.96 for earlier retirement benefits previously paid to Klayo. The employer notified Klayo that it would suspend payment of any retirement benefits until that $35,166.96 had been recovered.[8]

Plaintiffs brought this action in 2005, alleging inter alia that the reduction in their monthly retirement benefits, as well as the required repayment, violated the Americans With Disabilities Act. The underlying facts were largely undisputed. The district court granted summary judgment to the defendants.

The district court concluded that disputed reductions in the retirement benefits of disabled workers are permitted by the ADA.[9] First, the district court

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[7] 6a; Memorandum of Law In Support of The Motion for Summary Judgment Submitted by Defendant General Motors, Exhibits C, D and I.

[8] 6a, 31a; Memorandum of Law In Support of The Motion for Summary Judgment Submitted by Defendant General Motors, Exhibits D, F and I.

[9] The courts below characterized this issue as one of whether the plaintiffs "have standing under...the ADA to pursue their claims." (2a; see 7a, 8a, 10a, 25a). This is a confusing, if not incorrect, use of the term "standing." The plaintiffs certainly have

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held that the ADA simply does not protect disabled former employees from discrimination on the basis of disability. (32a-40a). The district judge acknowledged that the Second and Third Circuits had both held that disabled former employees are protected by the ADA. (36a-37a). He noted, however, that several other circuits – particularly the Sixth and Ninth Circuits – had reached the opposite conclusion, and decided to interpret the ADA, as had "a majority of circuits," to exclude disabled former employees from the protections of the Act. (39a). Second, the district court reasoned that the ADA permits an employer to reduce the benefits of disabled, but not non-disabled workers, because of outside sources of income. (40a-42a).

The Sixth Circuit affirmed. The court of appeals noted that "[w]hether disabled former employees are 'qualified individuals' under Title I [of the ADA] is an issue that has divided the circuits." (9a). The Sixth Circuit acknowledged that the Second and Third Circuits had held that disabled former employees are protected by the ADA (9a), but rejected the reasoning of those circuits as "tenuous at best." (20a). The Third

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standing in the constitutional sense; they were injured by the practice complained of, and would benefit from an order restoring the amount of their original retirement benefits or awarding improperly withheld past benefits. See *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 604-05 (3d Cir. 1998); *Conners v. Maine Medical Center*, 42 F.Supp.2d 34, 40 (D.Me. 1999).

Although the language utilized by the courts below may be of no substantive significance, for clarity we avoid this idiosyncratic use of the term "standing."

Circuit decision,[10] the court of appeals objected, "disregarded the plain language of the statute." (20a). The Sixth Circuit decided instead to follow the rule in "the majority" of circuit courts, which had concluded that disabled former employees are not protected from discrimination. (17a). The ADA, "by its plain language, ... does not apply to former employees who are unable to perform the essential functions of their jobs." (21a). That limitation, the Sixth Circuit held, applied to retired workers despite the fact that those workers – by definition – have no job functions to perform.

The court of appeals also held that the ADA, even if applicable to disabled former employees, permitted the employer to reduce the benefits of the disabled retirees, but not non-disabled retirees, on the basis of outside income. The ADA, it reasoned, only required General Motors to accord disabled workers "equal access to the benefit programs." (24a).

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[10] The reference is to *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998).

REASONS FOR GRANTING THE WRIT

I. THERE IS A DEEPLY ENTRENCHED INTER-CIRCUIT CONFLICT REGARDING WHETHER THE ANTI-DISCRIMINATION PROTECTIONS OF THE ADA APPLY TO DISABLED FORMER EMPLOYEES

In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), this Court held that Title VII applies to former employees. In the wake of *Robinson*, the courts of appeals have sharply disagreed as to whether the anti-discrimination provisions of the Americans With Disabilities Act apply to disabled former employees. Six circuits have now addressed this issue, openly disagreeing with one another as the proper construction of the ADA. In *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998), then Judge Alito noted that

> the difficult issue[ ] of...whether a former employee who can no longer work can meet Title I's "qualified individual with a disability requirement"...ha[s] divided the circuits.

145 F.3d at 615. "[T]he different positions staked out by the circuit courts are intractable and create an affirmative inter-circuit split." *Hatch v. Pitney Bowes, Inc.*, 485 F.Supp.2d 22, 34 (2007).

The conflict grows out of the awkward way in which the ADA is written. Section 12112(a) forbids an employer to "discriminate against a qualified individual with a disability because of the disability." 42 U.S.C. § 12112(a). Sections 12112(b) and 12112(d)

specify several types of discriminatory actions that are forbidden by section 101(a); although some of the provisions in sections 102(a) and 102(d) are limited to "qualified" employees or applicants,[11] many of those provisions contain no such restriction.[12] 42 U.S.C. §§ 12112(b), 12112(d). Section 12112(b), moreover, expressly forbids discrimination with regard to fringe benefits, certain types of which (such as retirement benefits) are only provided to former employees. Section 12111(8), on the other hand, defines "qualified individual with a disability" to mean "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the position that such individual holds or desires." 42 U.S.C. § 12111(8). Former employees, of course, usually neither hold nor desire any position with the employer that is providing them with fringe benefits. These divergent provisions have led to widespread disagreement among the lower courts as to whether the section 12112(a) prohibition against discrimination applies only to individuals who hold or desire, and are qualified for, a particular job, a restriction which would exclude disabled former employees.

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[11] 42 U.S.C. §§ 12112(b)(2) ("qualified applicant"), 12112(b)(4) ("qualified individual"), 12112(b)(5) ("qualified individual").

[12] 42 U.S.C. §§ 12112(b)(1) ("applicant or employee"), 12112(b)(3) ("discrimination on the basis of disability"), 12112(b)(6) ("individual with a disability"), 12112(b)(7) ("applicant or employee who has a disability"), 12112(d) ("applicant" and "employee").

Since 1997 this inter-circuit conflict has turned on a disagreement about the significance of this Court's decision in *Robinson*. The question in *Robinson* was whether section 704(a) of Title VII, which forbids retaliation against "employees" for certain protected activities, applies to former employees. The Court acknowledged that "[a]t first blush, the term 'employees' would seem to refer to those having an existing employment relationship with the employer in question." 519 U.S. at 341. But the meaning and possible ambiguity of statutory language, *Robinson* held, had to be evaluated in "the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* Read in those contexts, the Court held, "employees" could mean either current employees or former employees. *Robinson* noted in particular that there was "no temporal qualifier in the statute such as would make plain that § 704(a) protects only persons still employed at the time of the retaliation." *Id.* Since the statutory language was unclear, the Court interpreted "employees" to include former employees because that construction was "more consistent with the broader context of Title VII and the primary purpose of § 704(a)." 519 U.S. at 346.

In *Castellano v. City of New York*, 142 F.3d 58 (2nd Cir. 1998), the Second Circuit concluded that the decision in *Robinson* supported the conclusion that the ADA does apply to disabled former employees. *Robinson*, the Second Circuit noted, had held that

> the language of section 704(a) of Title VII is ambiguous and then interpreted the statutory language in light of the purposes of section 704(a) and Title VII.... This reasoning applies with equal force to the instant case.

142 F.3d at 69. The Second Circuit reasoned that in the case of the ADA there is "textual ambiguity surrounding the time at which a plaintiff must have been a 'qualified individual.'" *Id.*[13]

> An interpretation excluding from the ADA former employees or employees who can no longer perform the essential functions of their former employment would undermine the purpose of preventing disability discrimination in the provision of fringe benefits.

142 F.3d at 69. If the protections of the ADA did not apply to former employees at all,

> an employer could terminate an employee in violation of the ADA and then deny him fringe benefits, yet the employee could bring no ADA claim for the latter violation because

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[13] Section 12111(8) defines a "qualified individual with a disability" as an individual "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."...It fails to specify *when* a potential plaintiff must have been a "qualified individual with a disability" in the context of a claim that the provision of retirement or fringe benefits is discriminatory.

142 F.3d at 67 (emphasis in original).

> at the time of the discriminatory denial of fringe benefits he was a former employee who did not "hold" an "employment position."

142 F.3d at 67. If the protections of the ADA, although applicable to some former employees, were limited to those who were still able to perform their old jobs, the law

> would permit irrational discrimination as between disabled persons, some of whom (for whatever reason) could still perform the essential functions of their former employment and others of whom could not.

Id. The Second Circuit noted that the EEOC, which is primarily responsible for enforcing the employment provisions of the ADA, had concluded that the protections of the ADA apply to all former employees, including those who can no longer perform the essential functions of their old jobs. 142 F.3d at 69. The Second Circuit thus concluded that

> [b]ecause fringe benefits are earned for actual service in employment, it is irrelevant whether former employees, otherwise eligible for fringe benefits, could *also* perform such essential functions at or after termination of their employment.

142 F.3d at 68 (emphasis in original). The court of appeals expressly refused to adopt the contrary rule in the Sixth, Seventh and Eleventh Circuits. 142 F.3d at 68.

In *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998), the Third Circuit also relied on this Court's decision in *Robinson* in holding that "Title I of the ADA does permit disabled individuals to sue their former employers." 145 F.3d at 608. "Our impetus for this conclusion...comes from the Supreme Court's *Robinson* decision allowing former employees to sue under Title VII." 145 F.3d at 608. The Third Circuit agreed with the Second Circuit that the ADA was ambiguous, because it did not make clear whether a covered employee must be "qualified" at the time he earns a fringe benefit or at the time he seeks that benefit.[14] The Third Circuit also reasoned that the ADA was ambiguous because there was "an internal contradiction in the ADA itself." 145 F.3d at 605. Section 12112(b)(2) expressly forbids discrimination with regard to fringe benefits, some of which (as in the instant case) are provided only to former employees, while section 12111(8) defines "qualified individual" in a manner that seems to refer to current employees or applicants.

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[14] The locus of the ambiguity is whether the ADA contains a temporal qualifier of the term "qualified individual with a disability[.]" If the putative plaintiff must, at the time of the suit, be employable with or without a reasonable accommodation, then a disabled former employee loses his ability to sue to challenge discriminatory disability benefits. Alternatively, the term "qualified individual with a disability" may include former employees who were once employed with or without reasonable accommodations yet who, at the time of suit, are completely disabled.

145 F.3d at 606.

> This disjunction between the explicit rights created by Title I of the ADA and the ostensible standards for filing suit under Title I causes us to view the contents of those requirements as ambiguous.

145 F.3d at 606.

The interpretation of Title VII in *Robinson*, the Third Circuit reasoned, supported a similar construction of the ADA.

> The Supreme Court's recent decision in *Robinson*, which concerned the scope of Title VII..., contributes to this ambiguity by lending support for interpreting Title I of the ADA to permit suits by disabled individuals against their former employers.... Cases interpreting Title VII are relevant to our analysis of the ADA because the ADA is essentially a sibling statute of Title VII.... Our decision is...in keeping with the Supreme Court's *Robinson* decision, which found that the temporal reach of Title VII encompasses former employees....

145 F.3d at 606-07. The Third Circuit emphatically rejected the decisions of several other circuits which had held that the ADA does not protect former employees.

> By adopting this interpretation, we part ways with the Seventh and Eleventh Circuits, both of which tendered decisions prior to *Robinson*. In *EEOC v. CNA Ins. Companies*,

> 96 F.3d 1039 (7th Cir. 1996),...the Seventh Circuit's brief analysis conflates two issues, the first being whether the individual could sue regarding fringe benefits while completely disabled, and the second being whether the individual's suit had merit.... [W]e do not find the Seventh Circuit's reasoning persuasive....
>
> We also disagree with the Eleventh Circuit's ruling in *Gonzales v. Garner Food Services, Inc.*, 89 F.3d 1523 (11th Cir. 1996).... The Eleventh Circuit...failed to address the possibility that the disparity between the rights created by the ADA and the apparent legal remedy fashioned by the ADA creates an ambiguity in the eligibility requirements for obtaining a remedy.... [W]e respectfully disagree with the...sister courts of appeals.

145 F.3d at 607-08.

In *Johnson v. K Mart Corp.*, 273 F.3d 1035 (11th Cir. 2001), the Eleventh Circuit divided sharply about the significance of *Robinson*. Prior to *Robinson* the Eleventh Circuit had ruled that the ADA does not protect a disabled former employee. *Gonzales v. Garner Food Services, Inc.*, 89 F.3d 1523 (11th Cir. 1996). In *Johnson* a panel of the Eleventh Circuit concluded that *Gonzales* was bad law after *Robinson*, and held that "a former employee...is entitled to bring a claim against his former employer under § 12112(a) of Title I of the ADA." 273 F.3d at 1048. A majority of the panel reasoned that *Robinson* had fatally undermined the rationale of *Gonzales*.

> [T]he part of *Gonzales* wherein we decided that the meaning of the term "employees" in § 12111(4) plainly excluded former employees has been undermined by *Robinson*.... *Robinson* also undermines this court's previous finding that the term "discriminate," as defined in § 12112(b), plainly excludes former employees.... In light of the Court's emphasis in *Robinson* on the importance of temporal qualifiers, we must now acknowledge that it is hard to argue that §§ 12112(b)(1)-(b)(3) unambiguously contemplate discrimination encountered solely by job applicants and/or current employees.... [O]ur reliance in *Gonzales* on the legislative history of the ADA does not withstand the analysis in *Robinson*.

273 F.3d at 1044-48. The court expressly disagreed with the Ninth Circuit's refusal to apply *Robinson* to the ADA. 273 F.3d 1047.[15] A concurring opinion emphasized that "*Robinson*...clearly abrogates *Gonzales*." 273 F.3d at 1060 (Barkett, J., concurring).

> *Robinson* explicitly invalidates several of the propositions that informed...*Gonzales*.... [T]he *Robinson* Court, analyzed the same terms we examined in *Gonzales* and found these terms to be ambiguous.... [T]here is no doubt that the *Robinson* Court's decision

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[15] "Based on our reading of *Robinson*, we are convinced that...the Ninth Circuit in *Weyer* [*v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000)]...found more clarity in the language of § 12111(8) than is justified."

> invalidates *Gonzales*.... *Robinson* clearly invalidates our analysis in *Gonzales*.

273 F.3d at 1060-65. One member of the panel dissented, arguing that *Robinson* did not warrant the majority's decision to disregard the earlier Eleventh Circuit precedent in *Gonzales*. Although *Robinson* might have "weakened" the rationale of *Gonzales* and could "provide a springboard for the en banc court to reconsider settled circuit law," it had not "overruled" *Gonzales*. 273 F.3d at 1067-70 (Carnes, J., dissenting).[16] The Eleventh Circuit subsequently voted to rehear *Johnson* en banc. 273 F.3d at 1070. That rehearing has been stayed pending resolution of the bankruptcy proceedings regarding the defendant employer. *Johnson v. K Mart Corp.*, 281 F.3d 1368 (11th Cir. 2002).

Since this Court's decision in *Robinson*, on the other hand, the Sixth, Seventh and Ninth Circuits have taken the opposite position, holding that the ADA does not protect disabled former employees.[17]

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[16] The dissenting judge "express[ed] no view on how I would vote to decide the ADA coverage issue if we were reconsidering it en banc." 273 F.3d at 1070.

[17] The Eighth Circuit has held that disabled former employees are not protected from discrimination by the Rehabilitation Act of 1973. *Beaufort v. Father Flanagan's Boys' Home*, 831 F.3d at 768 (8th Cir. 1987). That circuit has not addressed this issue under the ADA, and has not considered the implications for either statute of this Court's decision in *Robinson*.

In the instant case the Sixth Circuit refused to apply the reasoning of *Robinson* to claims under the ADA, instead adhering to the Sixth Circuit's pre-*Robinson* decision in *Parker v. Metro. Life Ins. Co.*, 99 F.3d 181 (6th Cir. 1996) ("*Parker I*").

> Plaintiffs urge this court to reconsider *Parker I*'s conclusion in light of *Robinson*.... We decline to do so.... [T]he Ninth Circuit [in *Weyer*] reaffirmed the view held...prior to *Robinson*: the plain, unambiguous language of Title I does not permit disabled former employees to bring suit under the act.... The Seventh Circuit has also joined the Ninth Circuit in adopting the majority position post-*Robinson*.... [W]e do not think that *Robinson* requires a decision contrary to *Parker I*.

(15a-21a). If a retired worker was sufficiently disabled to qualify for SSDI, the court below reasoned, the worker would not be a "qualified individual with a disability." (9a). "[The ADA] does not apply to former employees who are unable to perform the essential functions of their jobs." (21a). The requirement that disabled individuals be able to perform "the essential functions of their jobs" applied to retired workers, the Sixth Circuit insisted, even though those individuals by definition have no job functions to perform. The court below insisted that this paradoxical requirement was mandated by the "unambiguous...plain language of the ADA." (21a). Because of the asserted clarity of the ADA, the court of appeals held that this

Court's decision in *Robinson* was inapplicable to the ADA. (21a).

The Sixth Circuit expressly rejected the contrary holdings of the Second and Third Circuits in *Castellano* and *Ford*, dismissing the analysis of those circuits as "tenuous at best" (20a), and objecting that "[t]he circularity of this reasoning is apparent." (20a n.5, quoting *Parker I*, 99 F.3d at 186 (6th Cir. 1996)). The court of appeals below criticized the Third Circuit decision in *Ford* because it "appears to have disregarded the plain language of the statute." (20a).

In *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000), the Ninth Circuit also rejected the argument that under the standard established by *Robinson* former employees are protected by the ADA. *Robinson* is inapplicable to the ADA, the court of appeals reasoned, because the plain language of the ADA does not cover former employees.

> Title I...unambiguously excludes former employees. A "qualified individual" is one who "can perform the essential functions of the employment position that such individual *holds* or *desires*." "Holds," in the present tense, refers to current employees. Likewise, "desires," in the present tense, refers to people who presently want jobs as opposed to...those no longer able to work....

198 F.3d at 1112 (emphasis in original). The Ninth Circuit thus concluded that the ADA was enacted solely "to enable disabled people who can work with

reasonable accommodation to get and keep jobs," not to "equalize post-employment fringe benefits for people who cannot work." 198 F.3d at 1112. The court of appeals expressly disagreed with the decisions of the Second and Third Circuits in *Castellano* and *Ford*.

> The Second and Third Circuits have...held...that former employees must be included [within the protections of the ADA.]... We reject this view.... We cannot accept the Third Circuit's view, that we should construe Title I contrary to what it says....

198 F.3d at 1111-12.

In *Morgan v. Joint Administration Board*, 268 F.3d 456 (7th Cir. 2001), the Seventh Circuit rejected the argument that *Robinson* required that circuit to reconsider its pre-*Robinson* decision holding that the ADA does not protect disabled former employees. See *EEOC v. CNA Ins. Companies*, 96 F.3d 1039 (7th Cir. 1996). Writing for the panel, Judge Posner concluded that disabled former employees would be *worse off* if they were protected by the ADA, because that would create an economic incentive for employers to refuse to establish any retirement benefit programs for disabled former employees.[18] The Seventh Circuit insisted that

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[18] Allowing former employees to complain about postemployment discrimination...would actually hurt them.... [I]t would create perverse incentives. Since there is no legal requirement that employers offer disability benefits as part of their menu of fringe benefits,...[t]he employer

(Continued on following page)

its earlier decision had already "anticipated" and rejected the rationale of *Robinson*, and refused to follow the decisions in the Second and Third Circuits that in light of *Robinson* "retired employees are protected by the ADA after all." 268 F.3d at 458.

The existence of this well-established inter-circuit conflict is widely recognized. The Sixth Circuit below candidly acknowledged that whether the ADA protects disabled former employees

> is an issue that has divided the circuits. The Second and Third Circuits take the minority position – that former employees who are totally disabled can be considered "qualified individuals" with standing to bring suit under [the ADA].... The majority position – that former disabled employees cannot be considered "qualified individuals" – has been explicitly adopted by the Ninth and Seventh Circuits.

(9a; see 15a (panel "decline[d]" to "join the Second and Third Circuits")). In *Ford* then Judge Alito noted that the courts of appeals were "divided" on this issue. 145 F.3d at 615. In *Johnson* the panel recognized that

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> would tell its employees to buy their own disability insurance.... Since workers with a disability are more likely than other workers to become totally disabled and have to retire early, an interpretation of the Act that discouraged employers from offering disability benefits would make the workplace less attractive to such workers.

268 F.3d at 458.

there is a "fractured series of decisions rendered by the court of appeals," 273 F.3d at 1068, noting that the Second and Third Circuits had held the ADA protects disabled former employees, while the Seventh and Ninth Circuits had taken the opposite position. 273 F.3d at 1068 n.4. In his dissenting opinion in *Johnson*, Judge Carnes argued that

> Judge Barkett obviously disagrees with the conclusions of Judges Flaum, Posner, and Williams of the Seventh Circuit in *Morgan* and of Judges Beezer, Wiggins, and Kleinfeld of the Ninth Circuit in *Weyer*, but the fact that there is a disagreement, and a two-to-two split of the other circuits that have addressed the issue since *Robinson* was released proves that there is substantial doubt about whether *Robinson* overruled or undermined to the point of abrogation the *Gonzales* decision.

273 F.3d at 1070 (Carnes, J., dissenting).[19] In *Weyer* the Ninth Circuit explained that "[w]e cannot avoid an inter-circuit conflict, because the Second and Third Circuits have held contrary to the Seventh and Eleventh Circuits." 198 F.3d at 1112.

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[19] See 273 F.3d at 1069 (dissenting opinion):

> A couple of other circuits in post-*Robinson* decisions have reached conclusions on the coverage issue that are different from the Ninth Circuit's in *Weyer* and the Seventh Circuit's in *Morgan*.... *Ford v. Schering-Plough Corp.*... *Castellano v. City of New York*....

Nine district court decisions have noted the existence of this inter-circuit conflict. *Hatch v. Pitney Bowes, Inc.*, 485 F.Supp.2d 22, 27 (D.R.I. 2007) ("[the] Courts of Appeal that have rendered decisions are unambiguously split on this issue"); *Hatch v. Pitney Bowes, Inc.*, 2005 WL 5394399 at *15 (D.R.I. 2005) ("the issue has produced a split among the circuits which have addressed it"); *Fletcher v. Tufts University*, 367 F.Supp.2d 99, 105 (D.Mass. 2005) (noting "the split of authority on this issue," contrasting decisions in the Seventh and Ninth Circuits with decisions in the Second and Third Circuits); *Iwata v. Intel Corporation*, 349 F.Supp.2d 135, 146-47 (D.Mass. 2004) (contrasting decisions in the Second and Third Circuits with contrary decisions in the Sixth, Seventh, Eighth and Ninth Circuits); *Heston v. Underwriters Laboratories, Inc.*, 297 F.Supp.2d 840, 843 (M.D.N.C. 2003) (noting "the split in case law" between the rule in the Seventh and Eleventh Circuits and the contrary rule in the Second and Third Circuits); *EEOC v. Group Health Plan*, 212 F.Supp.2d 1094, 1098 (E.D.Mo. 2002) ("[t]he Circuit Courts of Appeal are split on the issue of what effect *Robinson* has on the question of whether former employees are covered under the ADA"); *Fitts v. Federal National Mortgage Ass'n*, 44 F.Supp.2d 317, 321 (D.D.C. 1999) ("a split exists among the circuits"); *Conners v. Maine Medical Center*, 42 F.Supp.2d 34, 45 (D.Me. 1999) ("this Court declines to follow the Seventh and Eleventh Circuits and concurs with the decisions tendered by the Second and Third Circuits"); *Fennell v. Aetna Life Insurance Co.*, 37 F.Supp.2d 40, 42 (D.D.C. 1999)

("a split exists among the circuits as to whether a totally disabled former employee can bring a Title I [of the ADA] challenge").[20]

The EEOC, which is responsible for enforcing the employment discrimination provisions contained in Title I of the ADA, has consistently construed section 12112(a) to forbid discrimination against disabled former employees. The Commission has filed amicus briefs in five courts of appeals emphatically advancing that interpretation of the ADA.[21] The EEOC's Compliance Manual states that

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[20] In addition, the Massachusetts Commission Against Discrimination had noted the existence of this conflict in federal law.

> Courts across the country have split on the issue of whether an employee who brings a claim alleging discrimination in the provision of [employer-provided long-term disability] benefits must first demonstrate that he or she is qualified to perform the essential functions of his or her job. Compare...*Ford v. Schering-Plough Corp.*... *Castellano v. City of New York*...with *Parker v. Metropolitan Life Ins. Co.*....

Samartin v. Metropolitan Life Ins. Co., 2005 WL 2993469 at *3 (2005).

[21] Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of the Plaintiffs-Appellants, *Weyer v. Twentieth Century Fox Film Corp.*, 1998 WL 34082429 (9th Cir.); Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of the Appellant, *Ford v. Schering-Plough Corporation*, 1997 WL 33551474 (3d Cir.); Brief of the Equal Employment Opportunity Commission as Amicus Curiae, *Castellano v. The City of New York*, No. 96-7920 (2d Cir.); Brief of the Equal Employment Opportunity Commission as Amicus

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> [w]here an employer establishes either [a disability retirement or service retirement] plan[ ],...it may not discriminate against employees with disabilities.... As long as all employees may participate in the service retirement plan on the same terms, regardless of the existence of the disability, the employer will not violate the ADA....

(Compliance Manual, section 3, "ADA Issues" part V).[22] The Manual contains a section devoted exclusively to the non-discrimination requirements which the EEOC maintains are applicable to disability and service retirement plans. *Id.* ("Disability and Service Retirement Plans"). The Commission has filed suit under the ADA against private employers to prevent discrimination against disabled former employees[23] and has gone to court to enforce its subpoena power to investigate discrimination against such former employees.[24]

Curiae, *Gonzales v. Garner Fast Foods, Inc.*, 1995 WL 17057641 (11th Cir.); Brief of the Equal Employment Opportunity Commission, as Amicus Curiae, *Parker v. Metropolitan Life Ins. Co.*, 1995 WL 17809733 (6th Cir.).

[22] Available at http://www.eeoc.gov/policy/docs/benefits.html (visited Feb. 3, 2009).

[23] *EEOC v. CNA Insurance Companies*, 96 F.3d 1039 (7th Cir. 1996); *EEOC v. Deloitte & Touche, LLP*, 2000 WL 1024700 (S.D.N.Y. 2000).

[24] *EEOC v. Group Health Plan*, 212 F.Supp.2d 1094 (E.D.Mo. 2002).

In its brief in *Castellano*, the EEOC cogently explained the importance of this recurring issue. The district court in that case, like the Sixth Circuit in the instant case, had

> held that individuals may not challenge discrimination in the provision of post-employment benefits if they can no longer perform their former jobs. If upheld on this ground, the court's decision would insulate blatantly discriminatory benefit programs from challenge under Title I of the ADA whenever the discrimination is directed at former employees. Such a result, in our view, would subvert Congress' intent to prohibit disability discrimination in the provision of benefits.

Brief of the Equal Employment Opportunity Commission as Amicus Curiae, *Castellano v. The City of New York*, No. 96-7920 (2d Cir.) at 1-2.

> The language of the ADA indicates that Congress clearly intended to prohibit disability-based discrimination in the provision of employment-related benefits.... [M]any of the most essential fringe benefits that employers provide to their employees are, by definition, unavailable until the employee has stopped working. Not only pension benefits, but also long-term disability benefits, retiree health benefits, health insurance continued under COBRA, and deferred compensation plans,

> for example, are only available after an employee has retired or ceased working.

Id. at 8-9.

In its amicus brief in *Ford*, the EEOC pointed out that excluding disabled former employees from the protections of the ADA "would leave a substantial, arbitrary gap in coverage for benefit discrimination." Brief of the EEOC as Amicus Curiae, 1997 WL 33551474 at *7. The lower courts have repeatedly recognized the inequity of the gap created by the rule applied in this case, which withholds the protections of the ADA from disabled retired workers at the very point when they are most dependent on their fringe benefits.[25] That is precisely the type of unwarranted loophole in a major federal employment law which the United States suggested warranted a grant of certiorari in *Crawford v. Metropolitan Government of Nashville and Davidson County*, ___ U.S. ___ (2009). Brief of the United States as Amicus Curiae, No. 06-1595, at 18 ("The decision below creates an inexplicable gap in Title VII's anti-retaliation provision.")

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[25] *Hatch v. Pitney Bowes, Inc.*, 485 F.Supp.2d 22, 32 (D.R.I. 2007) (excluding former employees from the protections of the ADA would "create a remedial gap in Title I's statutory scheme, because Title I guarantees the right to be free from discrimination in the provision of fringe benefits"); *Lewis v. Aetna Life Ins. Co.*, 982 F.Supp. 1158, 1163 (E.D.Va. 1997) (excluding disabled former employees from protections of the ADA would create an "enormous...gap in the protection afforded by Title I [that] would be clearly at odds with the expressed purpose of the ADA").

This issue is ripe for resolution by this Court. The conflict has existed for more than a decade, since *Castellano* and *Ford* were decided shortly after this Court's decision in *Robinson*. In *Castellano* and *Ford* the Second and Third Circuits expressly considered and rejected the holding and reasoning of the contrary decisions in the Sixth, Seventh and Eleventh Circuits. In the instant case, *Morgan*, and *Weyer*, the Sixth, Seventh and Ninth Circuits expressly considered and rejected the holding and reasoning of the contrary decisions in the Second and Third Circuits. This issue has arisen in a variety of different circumstances, thus informing this Court's understanding of the implications and ramifications of these conflicting interpretations of the ADA. The circuit court decisions, although reaching sharply inconsistent results, have aired in a thorough and thoughtful manner the range of considerations bearing on the proper interpretation of the ADA. No purpose would be served by deferring action by this Court to definitively resolve this recurring and important question.

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THIS COURT

The retirement plans at issue in this case do not reduce the early retirement benefits of non-disabled retirees who have jobs, no matter how much they earn or for whom they work. The plans do, however, greatly reduce the retirement benefits of disabled retirees solely because they receive federal SSDI

benefits. The SSDI benefits which trigger that loss of retirement benefits would often be substantially less than what a non-disabled retiree – without any reduction in retirement benefits – would earn in a full time job. The Sixth Circuit held that the ADA permits such discrimination so long as disabled workers have "access" to the retirement plan. That crabbed interpretation of the ADA is in square conflict with this Court's consistent interpretation of the ADA and of the Rehabilitation Act on which it was based.

The distinction made by General Motors between disabled and non-disabled workers is clear. The income of non-disabled retirees is not subject to reduction based on their post-retirement earnings. They may earn as much as they can from whomever they please – General Motors, a competing automobile company, the Social Security Administration – without forfeiting a penny of their retirement benefits. If a retiree who took such a job and was later laid off receives unemployment compensation, his or her benefits are not reduced. If a retiree who took such a job was fired for some unlawful reason and subsequently wins an award of back pay, his or her benefits are not reduced. A benefit reduction is imposed, however, if a disabled retiree receives SSDI benefits.

This distinction is permitted by the ADA, the Sixth Circuit insisted, because the ADA requires only that disabled and non-disabled workers have "equal access to the same benefit plan." (24a). The Sixth Circuit's "equal access" standard was an exceptionally undemanding one. The ADA, on the Sixth Circuit's

view, required only that disabled workers be given "the option of rejecting" SSDI benefits in order to obtain the full retirement benefits, even though non-disabled workers are not required, as a condition of receiving the same benefits, to reject wages from post-retirement employment. (23a). On the Sixth Circuit's interpretation of the ADA, General Motors could adopt a policy of permitting most retirees to have post-retirement earnings, but cancelling the retirement benefits for any blind retiree who took a job; that would be "equal access" under the ADA because the blind retirees would have "the option of rejecting" any job offers, and could thereby continue to receive the same retirement benefits as gainfully employed sighted retirees.

The Sixth Circuit "equal access" rule reads into the ADA a severe restriction that is manifestly inconsistent with the decisions of this Court regarding ADA and the Rehabilitation Act from which the ADA derived. The Court has never imposed any such limitation on the federal prohibition against disability-based discrimination. The core requirement of that anti-discrimination principle, this Court has repeatedly held, is that "handicapped individuals receive 'even-handed treatment' in relation to nonhandicapped individuals." *Traynor v. Turnage*, 485 U.S. 535, 548 (1988).[26] The requirement of "evenhanded treatment" is not limited to evenhandedness in *what* benefits are

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[26] *Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979) ("evenhanded treatment").

available; it is equally applicable to the *conditions* which disabled and non-disabled individuals must meet to obtain the same benefit. Where, as here, only disabled retirees must forsake outside income to obtain the full General Motors retirement benefits, the program "treat[s] handicapped persons less favorably than nonhandicapped persons." *Traynor*, 485 U.S. at 548. The ADA, like the Rehabilitation Act, is "concerned...with discrimination in the *relative* treatment of handicapped and non-handicapped persons." *Bowen v. American Hospital Association*, 476 U.S. 610, 641 (1986) (quoting Brief for the United States) (emphasis in original).

In *Olmstead v. Zimring*, 527 U.S. 581 (1999), this Court rejected a proposed construction of Title II of the ADA that is indistinguishable from the interpretation of Title I adopted by the Sixth Circuit in the instant case. The plaintiffs in *Olmstead* were mentally disabled patients complaining that they, unlike non-disabled patients, could only obtain medical treatment if they agreed to live in a state institution. The defendants in *Olmstead* suggested that this treatment of the disabled plaintiffs did not constitute discrimination within the meaning of the ADA because the plaintiffs could obtain access to needed medical treatment by agreeing to reside in such an institution. This Court rejected that argument, holding that the defendant's practice was discriminatory because it imposed on disabled individuals seeking medical treatment a burden not imposed on non-disabled individuals.

> [C]onfinement in an institution severely diminishes the everyday life activities of individuals, including...work options.... In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice.

527 U.S. at 601. Like the practice held unlawful in *Olmstead*, the General Motors plan discriminates against disabled retires by requiring them – as a condition of receiving full early retirement benefits – to "relinquish [substantial outside income], while persons without...disabilities can receive [full early retirement benefits] without similar sacrifice."

In *Olmstead* the United States correctly pointed out that the practice at issue in that case "imposes a substantial burden on persons with disabilities that the State does not impose on persons without disabilities." (Brief for the United States as Amicus Curiae Supporting Respondents, No. 98-536, at 17, 1999 WL 149653). The practice at issue in the instant case discriminates in precisely that manner. The EEOC Compliance Manual provides that under the ADA retirement plans must permit "all employees [to] participate in the service retirement plan on the same terms, regardless of the existence of a disability." See text at n.22, *supra*. The General Motors plan, which makes forfeiture of outside income a "term" imposed

on disabled workers receiving SSDI, but not imposed on non-disabled workers with outside earnings, clearly violates that standard.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit. In the alternative, the Solicitor General should be invited to file a brief expressing the views of the United States.

Respectfully submitted,

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550 F.3d 519

United States Court of Appeals, Sixth Circuit.
Leroy **McKNIGHT**, Nicholas Klayo,
Robert Griffin, Plaintiffs-Appellants,
v.
GENERAL MOTORS CORPORATION,
Defendant-Appellee.
No. 07-1479.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 05-70666 – Arthur J. Tarnow, District Judge.

Argued: May 2, 2008

Decided and Filed: December 4, 2008

Before: GUY, SUHRHEINRICH, and
GIBBONS, Circuit Judges.

COUNSEL

ARGUED: Dennis D. James, REOSTI, JAMES & SIRLIN, P.C., Pleasant Ridge, Michigan, for Appellants. David Matthew Davis, HARDY, LEWIS & PAGE, P.C., Birmingham, Michigan, for Appellee. **ON BRIEF:** Dennis D. James, Ronald J. Reosti, REOSTI, JAMES & SIRLIN, P.C., Pleasant Ridge, Michigan, for Appellants. David Matthew Davis, HARDY, LEWIS & PAGE, P.C., Birmingham, Michigan, for Appellee.

OPINION

JULIA SMITH GIBBONS, Circuit Judge. Plaintiffs-appellants Leroy McKnight, Nicholas Klayo, and Robert Griffin ("plaintiffs") are former employees of General Motors Corporation ("GM") who accepted the early retirement option provided in GM's pension plans. Each plaintiff also applied for, and received, Social Security Disability Insurance Benefits ("SSDIB") following retirement. Pursuant to provisions of the GM pension plans, plaintiffs' retirement benefits were reduced by the amount received from the government in SSDIB benefits. The primary issue on appeal presents, in part, a question over which the circuits are split: whether disabled former employees have standing under Title I of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"), to bring suit against their former employers for discrimination with respect to the payment of post-employment fringe benefits. Plaintiffs contend that such employees do have standing under the ADA, and, moreover, GM's pension plans do not provide equal access to disabled and non-disabled employees. The district court disagreed with plaintiff's contentions and granted summary judgment in favor of GM.

For the reasons set forth below, we conclude that the plaintiffs do not have standing under Title I of the ADA to pursue their claims. Furthermore, we note that, even if plaintiffs had standing, their claims would fail on the merits. We therefore affirm the district court.

I.

A. *The Pension Plans*

Plaintiffs challenge provisions in two pension plans offered by GM: the General Motors Hourly-Rate Employees Pension ("GM Pension Plan") and the General Motors Retirement Program for Salaried Employees ("GM Retirement Program") (collectively, "the pension plans"). The pension plans have similar provisions providing for the payment of basic and supplemental benefits to individuals choosing to retire early after thirty years of service. Both pension plans also provide for a reduction in supplemental benefits if a beneficiary becomes eligible for SSDIB prior to reaching the age of 62 and one month.

Pursuant to Article II, Section 6 of the GM Pension Plan, an employee who retires after thirty years of service will receive a monthly early retirement supplement, in addition to the basic pension payment, until age 62 and one month. Section 6 provides:

> (a) An employee who retires under Section 2 . . . and who retires within five years of the last day worked for the Corporation will receive, in addition to the pension, certain supplements as set forth below:
>
> (1) If the employee retires under Section 2 or Section 3 of this Article II with 30 or more years of credited service at the date of retirement, such employee shall be entitled to a monthly early retirement supplement until age 62 and one month in an amount which when added to the monthly pension

> under this Plan will equal the amount of total monthly benefit provided in the table set forth below, subject to subsequent provisions of this Section 6: [table omitted].

The plan further provides for a reduction in supplemental benefits if, prior to the age of 62 and one month, the employee becomes eligible for SSDIB:

> (b) The early retirement supplement under provision (a)(1) of this Section 6 for an employee who retires at the employee's option shall be calculated assuming that the basic pension commences immediately after retirement, and such early retirement supplement and the interim supplement under provisions of (a)(2) of this Section 6 shall be reduced for any month prior to age 62 and one month, for which the employee becomes or could have become eligible for a Federal Social Security benefit, by an amount equal to the amount of the temporary benefit to which the employee would have been entitled if retired under Section 2(b) of this Article II.

Similarly, the GM Retirement Program also provides for basic and supplemental benefit payments and contains a nearly identical passage allowing for the reduction of supplemental benefits in light of SSDIB eligibility:

> (b) The early retirement supplement under subsection (a)(1) of this Section 7 for an employee who retires voluntarily shall be calculated assuming that the basic benefit commences immediately after retirement, and such early retirement supplement under

> subsection (a)(2) of this Section 7 shall be reduced for any month prior to age 62 and one month for which the employee becomes or could have become eligible for a Federal Social Security benefit, by an amount equal to the amount of the temporary benefit to which the employee would have been entitled if retired under Section 4 of this Article I.

In both pension plans, the "temporary benefit" – the amount by which the supplemental benefit is reduced – is apparently about equal to the amount the beneficiary receives from the government in the form of SSDIB.[1] The district court explained the significance of this plan structure: "Both the Pension Plan and the Retirement Program were designed to achieve what is referred to as 'benefit integration' with Social Security benefits. Benefit integration permits a higher level of income to all retired/disabled employees by allowing benefits under such plans to take credit for other income streams that a participant may be entitled to receive."

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[1] Although the plaintiffs suggest that the entire supplemental benefit payment is terminated upon eligibility for SSDIB, this does not appear to be the case. As the chart detailing the payments received by Leroy McKnight indicates, the supplemental benefit is reduced by the amount the beneficiary receives from the government in SSDIB (the "temporary benefit"), and, if the SSDIB amount is less than the supplemental benefit payment due to the beneficiary, GM continues to provide the remaining portion of the supplemental benefit.

B. *The Plaintiffs*

Leroy McKnight worked for GM as an hourly employee until January 31, 2000. On February 1, 2000, McKnight retired under the GM Pension Plan after completing more than thirty years of service. In November 2000, McKnight began receiving SSDIB benefits, and, accordingly, GM reduced McKnight's supplemental pension payments. GM also claims that, as a result of McKnight's SSDIB eligibility, it overpaid McKnight $10,489.50.

Robert Griffin worked for GM as a salaried employee for twenty-six years and, subsequently, transferred to American Axle and Manufacturing, Inc. After more than thirty total years of service, Griffin retired on December 1, 1998, and he now receives a retirement benefit from the GM Retirement Program for his twenty-six years of GM credited service. Griffin was awarded SSDIB effective April 1, 1999, and his retroactive award resulted in an overpayment by GM of $30,446.40 in supplemental benefits.

Also a former salaried GM employee, Nicholas Klayo retired on January 1, 1999, under the GM Retirement Program, after thirty years of credited service. Klayo was awarded SSDIB effective December 1, 2001, and his retroactive award resulted in an overpayment by GM of $35,166.96 in supplemental benefits.

Plaintiff Carol Dudek does not appeal the decision of the district court.

C. *Procedural History*

On October 17, 2005, plaintiffs filed an amended complaint in federal district court, alleging that GM's enforcement of the GM Pension Plan and the GM Retirement Program violated the ADA, the Employee Retirement Income Security Act ("ERISA"), and Michigan's Persons With Disabilities Civil Rights Act. On August 29, 2006, GM filed a motion for summary judgment. The district court granted GM's motion on March 20, 2007. The district court concluded that plaintiffs did not have standing under Title I of the ADA, and, even if they did have standing, plaintiffs had no viable ADA claim, as they had equal access to GM's pension plans. The court further found that GM's pension plans did not violate ERISA. Finally, the court declined to exercise supplemental jurisdiction over plaintiffs' state law claims. On appeal, plaintiffs challenge the district court's decision only with respect to their claim under Title I of the ADA.

II.

We review the district court's grant of summary judgment *de novo*. *Nance v. Goodyear Tire & Rubber Co.*, 527 F.3d 539, 546 (6th Cir. 2008). Summary judgment will be affirmed if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). If "a reasonable jury could return a verdict for the

nonmoving party," summary judgment for the moving party is inappropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In reviewing the district court's decision, we draw all justifiable inferences in favor of the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

III.

Pursuant to Title I of the ADA, an employer is prohibited from discriminating against a "qualified individual with a disability" with respect to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The Act defines a "qualified individual" as someone "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). "The plain language of the Act thus allows only those who are 'qualified individuals' to bring suit." *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1108 (9th Cir. 2000). Accordingly, we must first resolve the threshold issue of whether plaintiffs – former GM employees who have been adjudged disabled by the Social Security Administration – are qualified individuals with standing under Title I of the ADA.

A.

Whether disabled former employees are "qualified individuals" under Title I is an issue that has divided the circuits. The Second and Third Circuits take the minority position – that former employees who are totally disabled can be considered "qualified individuals" with standing to bring suit under Title I. *See Ford v. Schering-Plough Corp.*, 145 F.3d 601, 607 (3d Cir. 1998); *Castellano v. City of New York*, 142 F.3d 58, 60 (2d Cir. 1998). The majority position – that former disabled employees cannot be considered "qualified individuals" – has been explicitly adopted by the Ninth and Seventh Circuits. *See Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 457-58 (7th Cir. 2001); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1110 (9th Cir. 2000); *see also Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1161-62 (10th Cir. 1999) (seemingly adopting majority position in *dicta*). This court and others have also addressed the issue, but prior to the issuance of a potentially relevant Supreme Court decision, *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). *See Parker v. Metro. Life Ins. Co.*, 99 F.3d 181, 186 (6th Cir. 1996) (articulating majority position) ("*Parker I*"), *opinion vacated and decided on other grounds*, 121 F.3d 1006 (6th Cir. 1997) (*en banc*) ("*Parker II*"); *Gonzales v. Garner Food Servs., Inc.*, 89 F.3d 1523, 1531 (11th Cir. 1996) (same);[2] *see also Beauford v. Father Flanagan's Boys'*

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[2] *Gonzales* was overruled by *Johnson v. K Mart Corp.*, 273 F.3d 1035 (11th Cir. 2001), in light of *Robinson*. However, the

(Continued on following page)

Home, 831 F.2d 768, 771-72 (8th Cir. 1987) (articulating majority view in Rehabilitation Act context).

1.

In *Parker I,* this court examined, *inter alia,* whether an employer's long term disability plan, which provided different benefits for mental disabilities and physical disabilities, violated Title I of the ADA. 99 F.3d at 183. The *Parker I* panel upheld the district court's determination that the plaintiff, a disabled former employee, lacked standing under Title I of the ADA because she was not a "qualified individual with a disability" under the ADA. *Id.* at 185. The court explained,

> Under the District Court's interpretation of the plain meaning of that statute, [the plaintiff] was at no time a "qualified individual with a disability." At the time she could "perform the essential functions" of her job, she was not disabled for purposes of her long term disability claim, and therefore was not covered by the Disabilities Act, and at the time her insurance benefits were terminated, she could no longer perform her job.

Johnson opinion was vacated when the Eleventh Circuit granted rehearing *en banc.* The case has not yet been heard *en banc,* it has been held in abeyance until the resolution of the K Mart bankruptcy. *See Johnson v. K Mart Corp.,* 281 F.3d 1368 (11th Cir. 2002). Thus, it appears that *Gonzales* is the last word on this issue from the Eleventh Circuit.

Id. at 186. Agreeing with this reasoning, the court relied in part on *Beauford v. Father Flanagan's Boys' Home*, a case in which the Eighth Circuit found that similar language in the Rehabilitation Act did not apply to disabled employees unable to perform the essential functions of their jobs. *Id.* (citing *Beauford*, 831 F.2d at 771-73). The *Parker I* court further noted that the legislative history of the ADA also supported this interpretation of "qualified individual": "The legislative history . . . indicates that the main purpose of Title I was to ensure that disabled persons could obtain and keep employment, and therefore, it was not intended to provide relief for [the plaintiff]." *Id.*

In *Parker I,* the EEOC argued in an *amicus* brief that the statutory language of 42 U.S.C. § 12112(b)(2) indicates that a former employee who can no longer perform his job is a "qualified individual with disabilities." *Id.* Section 12112(b)(2) explains that the term "discriminate" includes "participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with . . . an organization providing *fringe benefits* to an employee of the covered entity . . .)." 42 U.S.C. § 12112(b)(2) (emphasis added). This provision, the EEOC argued, indicates that Congress intended the ADA to cover discrimination in the provision of fringe benefits; accordingly, "the fact that [a narrow interpretation of 'qualified individual'] would bar most employees from

challenging discrimination in the provision of long-term disability benefits strongly suggests that [this interpretation] is incorrect." *Parker I,* 99 F.3d at 186. The *Parker I* court rejected this argument, noting that "[t]he circularity of this reasoning is apparent." *Id.*

Additionally, the *Parker I* court rejected the plaintiff's contention that she was a "qualified individual" because she had the "employment position" of a "benefit recipient."[3] *Id.* The court dismissed this argument as mere "creative thinking," as "benefit recipient" does not appear anywhere in the statute itself. *Id.* at 186-87. Ultimately, the court relied on the plain language of the statute, concluding, "We should not try to rewrite the statute in a way that conflicts with what appears to be fairly clear language." *Id.* at 187. Any remedial gap resulting from this plain language, the court explained, "is for Congress to remedy." *Id.*

The *Parker I* opinion was technically vacated by this court's grant of rehearing *en banc.* The *en banc* court, however, did not address the Title I issue, noting that "Parker did not seek rehearing on the disposition of her Title I claim." *Parker II,* 121 F.3d at 1009 n.2. Although the *en banc* decision did not

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[3] As noted above, a "qualified individual" is someone "with a disability who, with or without reasonable accommodation, can perform the essential functions of the *employment position* that such individual holds or desires." 42 U.S.C. § 12111(8) (emphasis added).

address the Title I claim, the decision did fully affirm the district court's judgment. *Id.* 1019. We also note that other courts have relied on the *Parker I* panel's Title I discussion even after the opinion was vacated. *See Fobar v. City of Dearborn Heights,* 994 F. Supp. 878, 882-83 (E.D. Mich. 1998); *see also Weyer,* 198 F.3d at 1109; *Hatch v. Pitney Bowes, Inc.,* 485 F. Supp. 2d 22, 31-32 (D.R.I. 2007); *EEOC v. Group Health Plan,* 212 F. Supp. 2d 1094, 1097 & n.6 (E.D. Mo. 2002).

2.

Plaintiffs assert that, regardless of its precedential status, the *Parker I* panel's discussion of Title I should be revisited in light of *Robinson v. Shell Oil Co.,* 519 U.S. 337 (1997). In *Robinson,* the Supreme Court considered whether the plaintiff in a Title VII action could sue his former employer for postemployment actions allegedly taken in retaliation for the plaintiff's filing of an EEOC claim. *Id.* at 339. The Court held in favor of the plaintiff, concluding that former employees are covered by section 704(a) of Title VII. *Id.* at 346.

In reaching this conclusion, the Court laid out a roadmap for statutory interpretation. The Court began:

> Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.

> Our inquiry must cease if the statutory language is unambiguous and "the statutory scheme is coherent and consistent." . . .
>
> The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.

Id. at 340-41 (internal citations omitted). While "at first blush, the term 'employees' in § 704(a) would seem to refer to those having an existing employment relationship with the employer in question," the Court explained that this narrow interpretation of the term cannot withstand scrutiny in the context of § 704(a). *Id.* at 341. Specifically, the Court noted, neither § 704(a) nor Title VII's definition of "employee" contains any "temporal qualifier" indicating that § 704(a) only applies to former employees. *Id.* at 341-42. Furthermore, the Court observed, while some provisions of Title VII clearly used the term "employees" to mean "current employees," other sections used the word to mean something more inclusive than "current employees." *Id.* at 342-43. The Court concluded, "once it is established that the term 'employees' includes former employees in some sections, but not in others, the term standing alone is necessarily ambiguous." *Id.* at 343.

Having found that the term "employees" as used in § 704(a) is ambiguous, the Court resolved the ambiguity by examining "[t]he broader context provided by other sections of the statute." *Id.* at 345. In

determining that "employees" includes former employees, the Court noted that several other sections of the statute plainly contemplate the use of the remedial mechanisms of Title VII by former employees, and, moreover, such broad interpretation of the term comports with the purpose of the antiretaliation provisions of the statute. *Id.* at 345-46. A narrow interpretation of the term, the Court reasoned, would "vitiate much of the protection afforded by § 704(a)," as it would allow an employer "to retaliate with impunity against an entire class of acts under Title VII – for example, complaints regarding discriminatory termination." *Id.*

3.

Plaintiffs urge this court to reconsider *Parker I*'s conclusion in light of *Robinson* and join the Second and Third Circuits in holding that disabled former employees can bring suit under Title I of the ADA. We decline to do so. Rather, we adopt the majority position and conclude that former disabled employees do not have standing under Title I of the ADA.

Analyzing the question of Title I standing for disabled former employees in light of *Robinson,* both Second and Third Circuits found that Title I of the ADA was ambiguous with respect to the definition of "qualified individual with a disability." *See Ford,* 145 F.3d at 606 ("As with the term 'employees' in Title VII, the ADA contains an ambiguity concerning the definition of 'qualified individual with a disability'

because there is no temporal qualifier for that definition."); *Castellano,* 142 F.3d at 67 ("[Title I] fails to specify *when* a potential plaintiff must have been a 'qualified individual with a disability' in the context of a claim that the provision of retirement or fringe benefits is discriminatory.") Having determined that Title I was ambiguous as to the definition of "qualified individual," both courts concluded that a broader interpretation would comport with "the plain purpose of sections 12112(a) and (b)(2): to provide comprehensive protection from discrimination in the provision of fringe benefits." *Castellano,* 142 F.3d at 68; *Ford,* 145 F.3d at 607 ("We resolve this ambiguity by interpreting Title I of the ADA to allow disabled former employees to sue their former employers regarding their disability benefits so as to effectuate the full panoply of rights guaranteed by the ADA."). Thus, the Third Circuit found that the language "qualified individual with a disability" includes "disabled former employees, no longer able to work with or without reasonable accommodations." *Ford,* 145 F.3d at 608. In a similar vein, the Second Circuit held that a "qualified individual with a disability" includes a "former employee with a disability who 'with or without reasonable accommodation' could 'perform the essential functions of the employment position' for a period sufficient to establish entitlement to an employer-related fringe benefit (i.e., who is otherwise entitled to receive a fringe benefit)." *Castellano,* 142 F.3d at 69.

In contrast, in a decision subsequent to *Robinson, Ford*, and *Castellano,* the Ninth Circuit reaffirmed the view held by the majority of circuits, including this one, prior to *Robinson:* the plain, unambiguous language of Title I does not permit disabled former employees to bring a claim under the act. *Weyer,* 198 F.3d at 1112 ("We agree with the Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits that someone who is totally disabled cannot sue under Title I's unambiguous provisions."). The *Weyer* court distinguished the term at issue in *Robinson:* "Title I, unlike the section of Title VII at issue in *Robinson,* has a 'temporal qualifier.'" *Id.* The court explained:

> Title I says that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual." A "qualified individual" is someone who "*can perform.*" That definition uses the present tense. Thus, one must be able to perform the essential functions of employment at the time that one is discriminated against in order to bring suit under Title I. In addition, one must be discriminated against "because of the disability" – which requires that the disability exist at the time of the discrimination and be the motivation for the discrimination.

Id. Furthermore, the *Weyer* court noted, the words "holds" and "desires," both present-tense verbs, indicate that Title I unambiguously excludes former employees. *Id.*

The *Weyer* court deemed this interpretation to be a sensible reading of the statute, as "Congress could reasonably decide to enable disabled people who can work with reasonable accommodation to get and keep jobs, without also deciding to equalize post-employment fringe benefits for people who cannot work." *Id.* The court noted that five "compelling reasons" counsel in favor of a conclusion denying standing to disabled formed employees:

> First, the statute says so, quite plainly. Second, most circuits have said that it says so. Third, there is a sensible purpose Congress may well have had in saying so, which gives us confidence that we understand the words. Fourth, other legislation, such as ERISA, addresses fringe benefits for people unable to perform the functions of a job even with reasonable accommodations. Finally, other sections of the Act suggest that this distinction is intentional. For example, Title III of the Act regarding public accommodations applies not to "qualified individuals," but simply to any "individual."

Id. Noting that the Second and Third Circuits promote an interpretation that "construe[s] Title I contrary to what it says 'in order for the rights guaranteed by Title I to be fully effectuated,'" the *Weyer* court explained that "[i]t is rare, in a diverse democratic republic, for there to be a solid legislative majority for 'fully effectuating' any interest to the exclusion of all competing interests." *Id.* at 1113 (quoting in part *Ford*, 145 F.3d at 606). The *Weyer*

court concluded that the Second and Third Circuits' method of statutory interpretation has the potential to subvert the intent of Congress: "Legislation often results from a delicate compromise among competing interests and concerns. If we were to 'fully effectuate' what we take to be the underlying policy of the legislation, without careful attention to the qualifying words in the statute, then we would be overturning the nuanced compromise in the legislation, and substituting our own cruder, less responsive mandate for the law that was actually passed." *Id.*

The Seventh Circuit has also joined the Ninth Circuit in adopting the majority position post-*Robinson*. In a 2001 decision, the Seventh Circuit reaffirmed its prior interpretation of Title I,[4] notwithstanding the fact that "*Robinson v. Shell Oil* . . . has persuaded two of our sister circuits that retired employees are covered by the ADA after all." *Morgan*, 268 F.3d at 458. The court noted that its earlier decision had anticipated, and dismissed, the argument presented by *Robinson*. *Id.* (citing *CNA*, 96 F.3d at 1044-45). The court found that there was a "stark" difference between the question presented in *Robinson* – whether former employees could bring suit against their former employers for retaliation – and that presented in the case before the court – whether the court should "allow[] former employees to

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[4] The Seventh Circuit had previously concluded that Title I did not apply to former disabled employees in *EEOC v. CNA Insurance Cos.*, 96 F.3d 1039 (7th Cir. 1996).

complain about postemployment discrimination that does not involve retaliation." *Id.* The court further noted that the plain language of the statute supports the position that totally disabled former employees are not "qualified individuals with a disability." *Id.* at 458-59.

We agree with the position taken by the Ninth and Seventh Circuits. The Second and Third Circuits' finding of ambiguity in Title I is tenuous at best. In dismissing the reasoning of a pre-*Robinson* case finding no ambiguity in Title I, the Third Circuit stated, "[the decision] failed to address the possibility that the disparity between the rights created by the ADA and the apparent legal remedy fashioned by the ADA creates an ambiguity in the eligibility requirements for obtaining a remedy." *Ford,* 145 F.3d at 608 (also noting that "the ADA's proscription of discrimination in fringe benefits generates the need for disabled individuals to have legal recourse against such discrimination and exposes the temporal ambiguity in the ADA's definition of 'qualified individual with a disability'").[5] The *Ford* court appears to have disregarded the plain language of the statute – which does, in fact, contain temporal qualifiers, as explained above – and instead manufactured ambiguity where none existed.

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[5] This is similar to an argument rejected by the *Parker I* panel, which noted that "[t]he circularity of this reasoning is apparent." 99 F.3d at 186.

The majority position, however, comports with this court's decision in *Parker I,* and we do not think that *Robinson* requires a decision contrary to *Parker I.* The *Parker I* panel found the statute to be unambiguous, and *Robinson* did not alter the rules of statutory interpretation. Rather, the Court reiterated a well-established cannon of statutory interpretation: "Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" 519 U.S. at 340. As the majority of courts have held, Title I is unambiguous; by its plain language, it does not apply to former employees who are unable to perform the essential functions of their jobs. *See also Hatch,* 485 F. Supp. 2d at 34-35 (adopting, in a thoughtful opinion, the majority position); *EEOC v. Group Health Plan,* 212 F. Supp. 2d at 1097-99 (finding that *Robinson* did not overrule the Eighth Circuit's evaluation of the issue in the Rehabilitation Act context); *Fobar,* 994 F. Supp. at 881-84 (holding that *Robinson* did not warrant a "revisitation" of the disposition of the issue by the Sixth Circuit in *Parker I*). Furthermore, as other courts have noted, any resulting remedial gap in Title I of the ADA with respect to the provision of fringe benefits is partially filled by ERISA, "which seeks to police . . . fringe benefit abuses." *Hatch,* 485 F. Supp. 2d at 35; *Weyer,* 198 F.3d at 1112.

Accordingly, we conclude that disabled former employees are not "qualified individuals" with a disability under Title I of the ADA.

B.

We acknowledge the plain language of Title I suggests that disabled former employees who still "desire" their former employment positions might, in fact, have standing. *Cf. Hatch*, 485 F. Supp. 2d at 34 n.16 (observing that the word "desires" "may reasonably refer to former employees who still desire to work but, because of their disability, no longer are able to do so"). The instant case, however, does not provide us with an opportunity to examine this nuance. At oral argument, plaintiffs' counsel conceded that he "could not say" that his clients, disabled former employees, would return to work if GM permitted them to do so and provided them with reasonable accommodations. As such, plaintiffs neither "hold" nor "desire" their employment positions, as required for standing under Title I of the ADA. *See Weyer*, 198 F.3d at 1112 ("'[D]esires,' in the present tense, refers to people who presently want jobs, as opposed to those who do not, protecting job applicants against discrimination."). Plaintiffs, then, do not have standing to pursue their ADA claims.

IV.

We further observe that, even if plaintiffs had standing, the benefit plans in question do not violate the ADA. In *Leheny v. City of Pittsburgh*, 183 F.3d 220 (3d Cir. 1999), the benefit plan at issue provided that police officers who were at least 50 years of age and had at least 25 years of service could receive a

retirement benefit equal to 75% of their average monthly pay. *Id.* at 223. Disabled officers who were eligible for this benefit, but who were also receiving worker's compensation, could receive 66 2/3% of pay from worker's compensation and 50% of their pay under the pension plan. *Id.* at 223-34. Significantly, these disabled officers also had the option of rejecting worker's compensation and instead receiving the normal 75% retirement benefit. *Id.* at 230. Accordingly, the court held that the disabled retirees had no ADA discrimination claim:

> Every police officer who has attained 50 years of age and 25 years of service is permitted to receive a 75% pension upon retirement from the force; "every employee is offered the same plan regardless of that employee's contemporary or future disability status." The individual retiree is given the responsibility to decide whether or not to accept worker's compensation in lieu of a 75% pension. Because every eligible retiree is entitled to receive a 75% pension, and because each of the Retirees is permitted to receive a 75% pension when he no longer receives worker's compensation benefits, there is no violation of the ADA.

Id. at 230. In reaching this conclusion, the *Leheny* court relied on *Ford v. Schering-Plough*, 145 F.3d 601 (3d Cir. 1998), in which the Third Circuit examined whether an insurance plan providing different benefits for different types of disabilities violated the

ADA. Concluding that the plan did not violate the ADA, the court noted,

> Every Schering employee had the opportunity to join *the same plan with the same schedule of coverage,* meaning that every Schering employee received equal treatment. So long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for various disabilities.

Id. at 806 (emphasis added). Likewise, in the instant case, each plaintiff had equal access to the same benefit plan; thus, they too received equal treatment from GM. Accordingly, plaintiffs' ADA claims would also fail on the merits.

V.

For the foregoing reasons, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEROY MCKNIGHT, *ET AL.*,

Plaintiffs,

v.

GENERAL MOTORS CORP.,

Defendant.

_____/

CIVIL ACTION NO. 05-70666
HONORABLE ARTHUR J. TARNOW UNITED STATES DISTRICT JUDGE

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [D/E # 21]

For the reasons that follow, this Court GRANTS Defendant's Motion for Summary Judgment. Plaintiffs lack standing under the Americans with Disabilities Act ("ADA") to challenge the applicable pension integration provisions based on the plain language of the statute and case law. Even if standing were to exist, Plaintiffs' ADA claims would still be dismissed because Plaintiffs had equal access to General Motors' pension plans. Plaintiffs' Employee Retirement Income Security Act ("ERISA") claim is dismissed because ERISA authorizes the integration of Social Security Disability Insurance Benefits ("SSDIB") with pension benefits. Finally, this court declines to exercise supplemental jurisdiction over Plaintiffs' state law claim. As a result, the case is DISMISSED WITHOUT PREJUDICE as to the state law claim.

INTRODUCTION

From March 17, 1969, until February 1, 2000, Leroy McKnight was an hourly employee of General Motors Corporation ("GM"). On February 1, 2000, he opted for an early retirement package pursuant to a September 28, 1999, Supplemental Agreement Covering Pension Plan ("the Pension Plan") that was entered into by GM and the United Auto Workers. As a result, McKnight began receiving $501.89 in monthly pension benefits and $2,228.11 in monthly supplemental pension payments. In November 2000, he began receiving Social Security Disability Insurance Benefits ("SSDIB") in the amount of $1,592.20 a month on account of a back injury. Pursuant to the Pension Plan, GM reduced his supplemental pension payments by $1,165.50.

McKnight filed a charge with the Equal Employment Opportunity Commission ("EEOC"). After an investigation, the EEOC issued a right to sue letter on November 15, 2004, explaining that it was unable to conclude that GM had violated any statute.

McKnight then filed suit in district court asserting that the Pension Plan does not authorize GM to reduce pension benefits of disabled retirees who become entitled to SSDIB because it violates the ADA, the Michigan Persons With Disabilities Civil Rights Act ("PWDCRA"), and the ERISA. Plaintiff argues that he meets the terms of the Pension Plan by having over thirty (30) years of service, retiring early, and being able to perform the essential

functions of his former job at GM with reasonable accommodations at the time of his retirement.

On October 17, 2005, the complaint was amended to include three additional Plaintiffs who were treated similarly. These Plaintiffs claim that the provisions of the Pension Plan and the GM Retirement Program for Salaried Employees ("the Retirement Program"), which require a portion of one's early retirement supplement become unavailable at the time a retiree becomes or could have become eligible for a SSDIB, violate the ADA, the PWDCRA and the ERISA.

APPLICABLE PLAN PROVISIONS

The Pension Plan provides retirement benefits to eligible participants based on completion of years of credited service. Employees who retire after completing more than 30 years of credited service are eligible to receive an early retirement supplement until the retiree becomes eligible for Social Security benefits. Appendix A, Article II, § 6.

> (a) An employee who retires under Section 2 (other than an employee referred to in Section 4(d) of this Article II, unless the Corporation or Impartial Umpire under an applicable collective bargaining agreement determines the discharge should not result in the employee being ineligible for benefits under this Section 6, or Section 3 of this Article II, and who retires within five years of the last day worked for the Corporation will

receive, in addition to the pension, certain supplements as set forth below:

(1) If the employee retires under Section 2 or Section 3 of this Article II with 30 or more years of credited service at the date of retirement, such employee shall be entitled to a monthly early retirement supplement until age 62 and one month in an amount which when added to the monthly pension under this Plan will equal the amount of total monthly benefit provided in the table set forth below, subject provision of this Section 6.

Ex. A, p. 15.

The Pension Plan provides that a portion of the early retirement supplement, in an amount equal to the temporary benefit, is not payable once an retired employee becomes or could have become eligible for SSDIB either through disability or because they reach the age one becomes eligible for Social Security benefits (62 years and 1 month). Article II, § 6(b) provides:

(b) The early retirement supplement under provision (a)(1) of this Section 6 for an employee who retires at the employee's option shall be calculated assuming that the basic pension commences immediately after retirement, and such early retirement supplement and the interim supplement under provisions of (a)(2) of this Section 6 shall be reduced for any month prior to age 62 and one month, for which the employee becomes or could have become eligible for a Federal Social Security benefit, by an amount equal to the amount of the temporary benefit to which the

employee would have been entitled if retired under Section 2(b) of this Article II.

Ex. A., p. 17.

Plaintiffs challenge this provision that requires a reduction of the early retirement supplement once one becomes eligible for SSDIB.

Two Plaintiffs retired under the Retirement Program. Exhibit B. Their entitlement to the temporary benefits is described in Part A, Article 1, § 4(a)(ii):

> (ii) A temporary benefit for each year of credited service, up to 30 . . . The monthly temporary benefit shall be payable until the earlier of (1) age 62 and one month, or (2) the age at which the employee becomes, or could have become, eligible for a Federal Social Security benefit for disability or an unreduced Federal Social Security benefit for age. At such age the temporary benefit shall cease to be payable.

Ex. B. Entitlement to an early retirement supplement is described at Part A, Article I, § 7. Ex. B.

> (a) An employee who retires with benefits payable under Section 2 of this Article . . . or who retires with benefits payable under Section 4 of this Article, and who retires within five years of the last day worked for the Corporation will receive, in addition to retirement benefits, certain supplements as set forth below:

> (1) If the employee retires under Section 2 or 4 of this Article with 30 or more years of credited service at the date of retirement and such employee's date of hire was prior to January 1, 1998, such employee shall be entitled to a monthly early retirement supplement until age 62 and one month in an amount which when added to the monthly retirement benefit under this Part A and any supplementary benefits under Part B, prior to reduction for survivor coverage, will equal the amount of total monthly benefit provided set for below . . .
>
> (b) The early retirement supplement under subsection (a)(1) of this Section 7 for an employee who retires voluntarily shall be calculated assuming that the basic benefit commences immediately after retirement, and such early retirement supplement under subsection (a)(2) of this Section 7 shall be reduced for any month prior to age 62 and one month for which the employee becomes or could have become eligible for a Federal Social Security benefit, by an amount equal to the amount of the temporary benefit to which the employee would have been entitled if retired under Section 4 of this Article I.

Under both the Pension Plan and the Retirement Program, the early retirement benefits are designed to decrease by the amount received from the government either at the time when either: a) they reach the age to receive Social Security Benefits; or b) they become eligible for SSDIBs prior to age 62 and one month. Both the Pension Plan and the Retirement Program were designed to achieve what is referred to

as "benefit integration" with Social Security benefits. Benefit integration permits a higher level of income to all retired/disabled employees by allowing benefits under such plans to take credit for other income streams that a participant may be entitled to receive.

THE EMPLOYEES' CIRCUMSTANCES

After commencing early retirement, each Plaintiff became disabled prior to the age 62 plus one month. Additionally, each Plaintiff applied for and was later awarded SSDIB because they met the definition of disabled established by the Social Security Administration ("SSA").

After 30 years of credited service, McKnight retired under the Pension Plan on Feb 1, 2000. McKnight later applied for and was awarded SSDIB effective December 2000. GM now claims that it overpaid him $10,489.50.

Nicholas Klayo retired January 1, 1999 under the Retirement Program after 30 years of credited service. After filing for SSDIB in December 2002, Klayo was retroactively awarded SSDIB effective from December 2001. Due to the retroactive award, GM argues that he was overpaid $35,166.96 as a result.

Robert Griffin completed 26 years of credited service under the GM Retirement Program, then transferred to American Axle. In total he completed 30 or more years and retired December 1, 1998. Griffin receives retirement benefits from the Retirement Program for his 26 years as well as retirement

benefits from American Axle. Griffin filed his application for SSDIB on March 22, 1999 and was awarded SSDIB on April 1, 1999 for benefits retroactive from October 12, 1998. As a result, GM believes it overpaid him $30,446.40.

Carol Dudek, worked for GM for 24 years and then transferred to American Axle. On January 1, 1999, assets held in the GM Retirement Program for employees who still worked for GM component facilities were transferred to the retirement plan established by Delphi. As a result, she receives her retirement benefits from Delphi for 24 years and American Axle for 6 years.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT LACK OF STANDING UNDER THE ADA

The ADA prohibits discrimination against a qualified individual with respect to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms conditions and privileges of employment." 42 U.S.C. 12112(a). A qualified individual is defined as someone who has a disability "who with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. 12111(8).

> The regulations governing the ADA specifically provide that it is unlawful for an employer to discriminate on the basis of disability against a qualified individual with a

> disability in regard to 'fringe benefits available by virtue of employment . . . '. 29 C.F.R. § 1630.4(f) (1996). *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997) (*en banc*).

Plaintiffs were awarded SSDIB after being found to be disabled as defined by the SSA, *i.e.*, an "inability to do any substantial gainful activity because of any medically determinable impairment that can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 20 C.F.R. §§ 404.1505(a), 416.905(a). By qualifying for SSDIB and receiving benefits, none of the Plaintiffs can be considered a "qualified individual with a disability."

In *Parker v. Metro Life Ins. Co.* ("*Parker I*"), a three judge panel of the Sixth Circuit addressed the applicability of the ADA to a corporate disability plan's 24-month limitation of benefits to those affected by mental or nervous disorders. 99 F.3d 181 (6th Cir. 1996), *aff'd*, 121 F.3d 1006 (6th Cir. 1997) (*en banc*), *cert. denied*, 522 U.S. 1084 (1998). The panel upheld the district court's ruling that the former employee/plaintiff lacked standing to raise a Title I ADA claim because she could not perform the essential functions of her job and therefore was not a "qualified individual with a disability" as required by the ADA. *Id.* at 185. The plaintiff in *Parker I* argued that she was invoking he statute in an effort to retain the "employment position" of a "benefit recipient." *Id.* at 186. The panel responded by stating:

> Plaintiff's proposed construction of the statute is not persuasive. The concept of "benefits recipient" as an "employment position" relies on a convoluted construction of the statutory language, which conflicts with the plain meaning of the words. Perhaps the drafters of the statute intended that Ms. Parker's situation to bring her within the coverage of the Disabilities Act. If that is the case, they failed to provide definitions that lend themselves to doing so. Unfortunately, Congress may not have taken this situation into account. Such an oversight, however, is for Congress to remedy. We should not try to rewrite the statute in a way that conflicts with what appears to be fairly clear language. *Id.* at 187.

In an opinion that did not specifically address the issue of standing,[1] an *en banc* panel of the Sixth Circuit determined that even though the ADA prohibited discrimination between disabled and non-disabled, the plan's provisions did not violate the ADA because

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[1] The case was reviewed *en banc* but only with respect to the district court's decision concerning Plaintiff's separate Title III argument. The standing issue was not addressed because "Although Parker discusses her Title I claim in her briefing to the en banc court, Parker did not seek rehearing on the disposition of the Title I claim." *Id* at 1008 fn. 2. The *en banc* decision recounted that the district court dismissed plaintiff's Title I claim due to lack of standing. "Because Parker was not a qualified individual under Title I, a suit against her employer could not be maintained under the ADA." 121 F.3d at 1008.

the employees received the "same access" to benefit plans.

> The disparity in benefits provided in the policy at issue is also not prohibited by the ADA because the ADA does not mandate equality between individuals with different disabilities. Rather, the ADA prohibits discrimination between the disabled and the non-disabled; specifically, the ADA mandates that the owners, lessors, and operators of public accommodations provide equal access to the disabled and non-disabled. Because all employees at Schering-Plough, whether disabled or not, received the same access to the long-term disability plan, neither the defendants nor the plan discriminated between the disabled and the able bodied. *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1015-16 (6th Cir. 1997) (*en banc*) ("*Parker II*").

Applying the rationale of *Parker I,* Plaintiffs lack standing to raise an ADA claim because they are not qualified individuals, *i.e.,* they cannot perform the essential functions of their employment positions with or without reasonable accommodations at the time of the alleged discrimination.

Plaintiffs argue that the *Parker I* decision is not binding precedent since the opinion was vacated and the case was decided on separate grounds by the *en banc* panel. Plaintiffs contend that a former employee's standing to sue for benefits discrimination under Title I should be measured at the time of retirement when a plaintiff was "otherwise able to

perform the essential functions of their former jobs with Defendant, with reasonable accommodation," not at the time of suit as the *Parker I* court determined. This measure was adopted by the Second Circuit Court of Appeals' opinion *Castellano v. City of New York,* where the court ruled that disabled plaintiff-retirees had standing under the ADA to file suit if they were able to perform the essential functions of their jobs with or without accommodation up to the time they became eligible for the benefits in question. 142 F.3d 58, 69 (2nd Cir. 1998). In arriving at this conclusion, the court determined that the legislative history of the phrase "qualified individual with a disability" was not conclusive in defining the time of an employment action. *Id.* at 67. To determine the correct measure, the court then looked to the essential function of the ADA, to stop disability discrimination whenever it happens. *Id.* at 67-68. Since this broad interpretation was proper, the court found that a retiree who works long enough to establish entitlement to an employer-related fringe benefit is a "qualified individual with a disability" within Title I of the ADA. *Id.*

Despite Plaintiffs' argument to the contrary, *Parker II* did not disturb the original panel's disposition of the Title I issues in *Parker I.* According to a footnote in the *en banc* opinion, *Parker I's* Title I standing ruling was not raised as an issue when Plaintiff sought rehearing. 121 F.3d at 1009, fn. 2. Thus, the *en banc* court neither adopted nor rejected *Parker I*'s rationale on this issue. Although the *Parker*

I opinion may have been technically vacated through an order to hear the case *en banc,* the opinion is still cited and the reasoning is still relied upon by other circuits. *See Weyer v. Twentieth Century Fox Film Corp.,* 198 F.3d 1104 (9th Cir. 2000); *see also EEOC v. CNA Ins. Cos.,* 96 F.3d 1039 (7th Cir. 1996); *Gonzales v. Garner Food Services, Inc.,* 89 F.3d 1523 (11th Cir. 1996); *Beauford v. Father Flanagan's Boys' Home,* 831 F.2d 768 (8th Cir. 1987); *Smith v. Midland Brake, Inc.,* 180 F.3d 1154 (10th Cir. 1999). In terms of legal landscape surrounding this issue, only the Second Circuit, Third Circuit and certain First Circuit district courts follow this "at the time of retirement" rule announced in *Castallano. See Castallano,* 142 F.3d 58 (2nd Cir. 1998); *Ford v. Schering-Plough Corp.,* 145 F.3d 601 (3rd Cir. 1998); *see also Fletcher v. Tufts,* 367 F.Supp.2d 99 (D. Mass. 2005).

In a case with a similar factual scenario as this case, the Ninth Circuit joined the majority of Circuit Courts by rejecting a similar claim by holding that Plaintiff was not a qualified individual and thus was not protected by the ADA. *Weyer v. 20th Century Fox Film Corp, supra.* In *Weyer,* the plaintiff, who was totally disabled and collecting SSDIB, sought to challenge discrimination in fringe benefits applicable to a period of time following termination of her employment. Following the rationale of *Parker I,* the Ninth Circuit held that the plaintiff lacked standing to pursue an action under the ADA.

> We join the five circuits that have held that only persons who can perform the essential

functions of a job can sue under Title I, rather than the two circuits that have held to the contrary, for compelling reasons. First, the statute says so, quite plainly. Second, most circuits have said it says so. Third, there is a sensisble purpose Congress may well have had in saying so, which gives us confidence that we understand the words. Fourth, other legislative, such as ERISA, addresses fringe benefits for people unable to perform the functions of a job even with reasonable accommodations. Finally other sections of the Act suggest that this distinction is intentional. For example, Title III of the Act regarding public accommodations applies not to "qualified individuals," but simply to any individual.

We agree with the Sixth, Seventh, Tenth and Eleventh Circuits that someone who is totally disabled cannot sue under Title I's unambiguous provisions. Weyer is not a "qualified individual" because she cannot now perform the essential functions of the employment position as a result of her total disability, and because she was not disabled at the time of the alleged discriminatory conduct. The term "qualified" limits the protection of Title I of the Act.

Title I also unambiguously excludes former employees. A "qualified individual" is one who "can performs the essential functions of the employment position that such individual *holds or desires*." "Holds," in the present tense, refers to current employees. Likewise,

> "desires," in the present tense, refers to people who presently want jobs, as opposed to those who do not, protecting job applicants against discrimination. This is language well designed to help people get and keep jobs, not help those no longer able to work get disability pay, Congress has the authority to improve the circumstances of disabled people in some respects even if it does not improve them in all respects. A statute may provide a partial remedy for what Congress perceives as a social problem because the proponents are compelled to compromise with others who think a broader statute would be a worse social problem.

Id. at 1112.

Even if the ruling of *Parker I* is not controlling precedent, at the very least, the opinion is instructive as to how the Sixth Circuit would rule if again presented with this issue. Additionally, a majority of circuits and district courts have found that standing does not exist, including a colleague from this district court who similarly relied on the reasoning of *Parker I*. *Fobar v. City of Dearborn,* 994 F.Supp. 878, 882-884 (E.D. Mich. 1998) (J., Rosen). The plain language requires that to have standing the person "can perform" the essential functions of the employment position that the individual "holds or desires." The retirees cannot perform the essential functions of the jobs since they are disabled as defined by the SSA. Additionally, the retirees neither hold nor desire their former positions since they elected to take early

retirement. Based on the majority of case law, the Sixth Circuit's ruling on this issue in *Parker I,* and the plain language of the statute, this court finds that Plaintiffs lack standing to sue under the ADA because they do not fit within the Act's definition of a qualified individual with a disability.

Equal Access

Even if Plaintiffs had standing to sue under the ADA, this court finds there would be no ADA violation based on the reasoning of *Leheny v. City of Pittsburgh,* 183 F.3d 220 (3rd Cir. 1999). In *Leheny,* disabled police officers brought an action against the City of Pittsburgh contending, in part, that the offset of their pension benefits by worker's compensation violated provisions of the ADA. *Id.* at 224-25. Under the collective bargaining agreement as modified by an arbitration award which included a pension plan provision, officers who were at least 50 years old and had at least 25 years experience could receive an enhanced retirement benefit equal to 75% of their average monthly pay. *Id.* at 223. For disabled officers receiving worker's compensation, the award provided that the officer could receive up to 66 2/3% of their pay from worker's compensation and receive 50% of their average monthly pay. *Id.* The award further provided that if worker's compensation benefits were reduced or eliminated after retirement, the pension could be increased back to 75% of their average monthly pay. *Id.* at 224.

The Third Circuit ruled that these provisions were not violative of the ADA because every employee had access to the same benefit plan. "Every police officer who has attained the age of 50 years of age and 25 years of service is permitted to receive a 75% pension upon retirement from the force; 'every employee is offered the same plan regardless of that employees contemporary or future disability status.'" *Id.* at 230.

> The Retirees are not prevented from receiving a 75% pension if they so desire. The arbitration award clearly states that every police officer [sic] who has attained 50 years of age and 25 years of service is entitled to receive a 75% pension upon retirement from the police officer [sic]. Disabled officers are not required by the arbitration award to accept the 50% pension and 66 2/3% worker's compensation. There is nothing in the circumstances that prevents a retired police officer from rejecting worker's compensation payments and thereby receiving the 75% pension.

Id.

Similar to the *Leheny* case where the retirees sought benefits of over 100% of their former salary, Plaintiffs seek to combine full SSDIB on top of their full GM pension benefits. Plaintiffs not only receive an amount equal to what they would receive if they only were given GM's temporary retirement supplement, they receive more than if they had just retired. Plaintiffs voluntarily elected to retire under the GM

plans after 30 years of service. At the time, each had documentation that indicated how SSDIB award before the age of 62 plus one month would cause a cessation or reduction in benefits in the amount of the temporary benefit. Everyone, both the able, the disabled, and the future disabled had equal access to the benefits programs. Plaintiffs chose to apply for and later received SSDIB, which resulted in a reduction of their temporary entitlements. Thus, even if Plaintiffs had standing, there is no violation of the ADA.

ERISA Claim

In *Allessi v. Raybestos-Manhattan, Inc.*, the Supreme Court considered whether ERISA's nonforfeitability provisions would prohibit the integration of pension benefits with other income. 451 U.S. 504 (1981) The Court explained that the establishment of pension plans and the level of benefits they provide are left to the discretion of the employer:

> ERISA leaves this question largely to the private parties creating the plan. That the private parties, not the Government, control the level of benefits is clear from statutory language defining nonforfeitable rights as well as from other portions of ERISA.

Id. at 511. The term nonforfeitable was defined "a claim to the benefit and not the benefit itself, that must be 'unconditional' and 'legally enforceable against the plan.'" *Id.* at 512, quoting *Nachman v.*

Pension Benefit Guaranty Group, 446 U.S. 359, 371 (1980).

The Court's attention then turned to the plan's integration of pension benefits with other income streams, in particular Social Security benefits. It was determined that this process leads to a higher level of benefits for all participants. *Id* at 515. In analyzing whether the practice was permitted, the Court looked to Congress and determined that they did not prohibit this type of integration and "expressly preserved the option of pension fund integration with benefits available under both the Social Security Act . . . and the Railroad Retirement Act." *Id* at 514-515.

The Court also discussed plan integration with workers compensation, a variant of what occurred in this case.

> [R]etirees conclude that integration with pension funds with workers' compensation awards lacks the rationale behind integration with pension funds with Social Security and Railroad Retirement . . . [However] [b]oth the Social Security and Railroad Retirement Acts provide payments for disability as well as for wages lost due to retirement, and ERISA permits pension integration without distinguishing these different kinds of benefits.

Id. at 518-519.

The *Allessi* opinion demonstrates that the Supreme Court has long recognized the value of integrating pension benefits with other income, including

SSDIB since it specifically held that such integration is allowed under ERISA. Even though not addressed by the Supreme Court decision in *Allessi* since it was prior to the passage of the ADA, every court that has since considered the question of the lawfulness of whether pension integration under the ADA has found it to be lawful. *See Bonovich v. Knights of Columbus,* 146 F.3d 57, 60 (2nd Cir. 1998); *Huppeler v. Oscar Mayer Foods Corp.,* 32 F.3d 245 (7th Cir. 1994); *Hammond v. Xerox Corp. Retirement Income Guarantee Plan,* 1999 WL 33915859 (C.D. Cal. 1999); *DiCioccio v. Duquesne Light Co.,* 911 F.Supp. 880 (W.D. Penn. 1995).

This court agrees that integration of social security benefits and pension benefits have long been recognized as a valid practice by the Internal Revenue Service, Congress and the courts. Thus, Plaintiffs' claim that the pension integration provisions violate the ERISA is dismissed because it has no merit.

Supplemental Jurisdiction

Under 28 U.S.C. § 1367(c)(3), a district court may decline to exercise supplemental jurisdiction if all claims over which it has original jurisdiction have been dismissed. Because Plaintiffs' ADA and ERISA claims have been dismissed, Plaintiffs have no basis for federal jurisdiction. Therefore, the court lacks subject matter jurisdiction, and will decline to exercise its

supplemental jurisdiction over Plaintiffs' state law claims.

CONCLUSION

For the reasons stated above,

IT IS ORDERED that Defendant's Motion for Summary Judgment is **GRANTED** and as a result the case is **DISMISSED WITHOUT PREJUDICE** to the state law claims.

/s/ Arthur J. Tarnow
Arthur J. Tarnow
United States District Judge

Dated: March 20, 2007

I hereby certify that a copy of the foregoing document was served upon counsel of record on March 20, 2007, by electronic and/or ordinary mail.

/s/ Theresa E. Taylor
Case Manager

STATUTES AND REGULATIONS INVOLVED

42 U.S.C. § 11211(4) provides:

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

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42 U.S.C. § 11211(8) provides:

The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

As of January 1, 2009, 42 U.S.C. § 12112(a) provides:

General rule. – No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Prior to January 1, 2009, 42 U.S.C. § 12112(a) provided:

General rule. – No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment.

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42 U.S.C. § 12112(b) provides[1]:

(b) Construction As used in subsection (a) of this section, the term "discriminate against a qualified individual on the basis of disability" includes –

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor

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[1] Prior to January 1, 2009, this section began, "As used in subsection(a), the term 'discriminate' includes – ."

union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration –

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

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42 U.S.C. § 12112(d) provides:

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if –

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that –

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

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42 U.S.C. § 12113(a) provides:

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

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42 U.S.C. § 12117(a) provides:

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

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29 C.F.R. § 1630.07 provides:

Standards, criteria, or methods of administration.

It is unlawful for a covered entity to use standards, criteria, or methods of administration, which are not

job-related and consistent with business necessity, and:

(a) That have the effect of discriminating on the basis of disability; or

(b) That perpetuate the discrimination of others who are subject to common administrative control.

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29 C.F.R. § 1630.10 provides:

Qualification standards, tests, and other selection criteria.

It is unlawful for a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.